***UNITED STATES DISTRICT COURT***

***DISTRICT OF MAINE***

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| ***UNITED STATES OF AMERICA,*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | ***Criminal No. 95-59-P-H*** |
| | ***)*** | ***(Civil No. 97-270-P-H)*** |
| ***JEMAL MAURICE SIMMONS,*** | ***)*** | |
| | ***)*** | |
| ***Defendant*** | ***)*** | |

***RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255***

Jemal Maurice Simmons moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 135 months was imposed after his plea of guilty to one count of conspiracy to distribute and possess with intent to distribute five grams or more of a mixture or substance containing cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846, and one count of distribution and possession with intent to distribute five grams or more of a mizture or substance containing cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). Judgment (Docket No. 32). Simmons, appearing *pro se*, contends that he was deprived of the effective assistance of counsel at his sentencing.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citations omitted). In this instance, I find that Simmons' allegations, accepted as true, would not entitle him to relief.

Accordingly, I recommend that the motion be denied without an evidentiary hearing.

## I. Background

On January 5, 1996 Simmons entered a plea of guilty to two counts of an indictment, Docket No. 11, charging him with distribution and possession with intent to distribute a substance containing five grams or more of a mixture or substance containing cocaine base and with conspiracy so to distribute and possess, Transcript of Proceedings (Docket No. 61) ("Plea Tr.") at 3. In determining sentencing, the court found that Simmons' criminal history category under the United States Sentencing Commission Guidelines ("U.S.S.G.") was Category V, and that the applicable guideline range was 120 to 150 months. Judgment at 6. The court imposed a sentence of 135 months. *Id*. at 2.

At the change-of-plea hearing, the court asked Simmons whether he understood that he was charged with conspiracy and distribution and possession with intent to distribute "five grams or more of cocaine base, sometimes known as crack," Plea Tr. at 4-5, and Simmons answered "Yes, Your Honor," *id*. at 5. In discussing the minimum sentence applicable to Simmons with the court, Simmons' attorney referred to "[f]ive grams or more of crack." *Id*. at 9. He referred to the substance as "crack cocaine" twice more. *Id*. at 13, 14. After his attorney reviewed the Prosecution Version with the court, Simmons stated that the Prosecution Version, with the exceptions pointed out by his counsel, was true. *Id.* at 16. The Prosecution Version refers to the substance repeatedly as "crack cocaine." Prosecution Version (Docket No. 22) at 1, 3. Simmons' attorney did not dispute this characterization at the plea hearing.

At the sentencing hearing, the court referred several times to the substance at issue as "crack"

or "crack cocaine." Transcript of Proceedings (Docket No. 43) ("Sentencing Tr.") at 3,19, 20. Simmons' attorney referred to it as "crack cocaine." *Id*. at 5, 6, 7. The prosecutor referred to it as "crack cocaine." *Id.* at 9, 10, 11, 12. And Simmons himself, referring to the actions that gave rise to the charge to which he pled guilty, stated, "I got caught with an ounce. Well, 39 grams of crack cocaine." *Id.* at 16. He acknowledged reading and discussing the presentence report with his attorney. *Id.* at 3. That report refers to the substance at issue as "crack cocaine" several times. Revised Presentence Investigation Report (Mar. 6, 1996) at 3, 4.

## II. Analysis

As the basis for his claim of ineffective assistance of counsel during sentencing, Simmons asserts that his attorney "failed to hold the prosecution to its burden of proof" because he "did not require the government to show that the substance Petitioner was convicted of possessing, was in fact cocaine base by a proponderence [sic] of the evidence as required by law." Motion (Docket No. 59) at 5. Simmons relies primarily on *United States v. James*, 78 F.3d 851 (3d Cir. 1996), to support his argument that he should have been sentenced for crimes involving cocaine rather than crack. The relevant section of the Guidelines is section 2D1.1(c). Simmons contends that his trial counsel provided constitutionally deficient assistance by failing to so argue at sentencing, two months before the Third Circuit decided *James*.

*Strickland v. Washington*, 466 U.S. 668 (1984), provides the applicable standard for assessing whether a defendant has received ineffective assistance of counsel such that his Sixth Amendment right to counsel has been violated. The defendant must show that his counsel's performance was deficient, i.e., that the attorney "made errors so serious that counsel was not functioning as the

'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Second, the defendant must make a showing of prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The court need not consider the two elements in any particular order; failure to establish either element means that the defendant is not entitled to relief. *Id.* at 697. The *Strickland* standard applies to claims of ineffective assistance of counsel raised in connection with a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985).

The Third Circuit in *James* held that the government has the burden of proving that the form of cocaine base that the defendant sold was actually crack in order for the sentencing guidelines for crack to apply. 78 F.3d at 858. A district court in the Third Circuit has recently held that *James* imposes a new procedural obligation upon the government and therefore will not apply retroactively to sentences imposed before it was announced. *United States v. Walker*, 1997 WL 642992 (E. D. Pa. Oct. 20, 1997), at *3-4. Of course, *James* does not provide binding precedent in the First Circuit. *See United States v. Fulton*, 960 F. Supp. 479, 494 (D. Mass. 1997) (court not persuaded that the First Circuit would follow *James*). Indeed, the First Circuit has noted that crack cocaine is "cocaine base" for purposes of regulation of controlled substances under 21 U.S.C. § 841(a)(1). *United States v. Sanchez*, 81 F.3d 9, 10 (1st Cir. 1996).

In any event, the instant case is easily distinguishable from *James*. In *James*, the only reference to "crack" in the record was made by the government during the plea colloquy. The Third Circuit stated:

> We do not believe that, without more, the casual reference to crack by the Government in the colloquy with the court over the relevant quantity of cocaine base in determining [the defendant's] offense level unmistakably amounted to a knowing and voluntary admission that the cocaine base constituted crack.

78 F.3d at 856 (internal quotation marks omitted). Here, in contrast, Simmons himself clearly stated that the substance at issue was crack, and he acknowledged his familiarity with portions of the record where the substance was identified as crack.[1] The defendant's statements at the plea colloquy and the sentencing hearing establish that his admission that the substance involved in the offense was cocaine base in the form of crack was knowing and voluntary. *United States v. Brown*, 957 F. Supp. 696, 698 (E. D. Pa.), *aff'd* __ F.3d __ (3d Cir. Aug. 15, 1997) (table). Simmons' failure to contest the presentence report on the ground that he was not dealing in crack is also significant. *United States v. Washington*, 115 F.3d 1008, 1010-11 (D. C. Cir.1997) (distinguishing *James* on this basis).

In addition to the fact that Simmons' counsel cannot be faulted for failing to argue a theory that had not been adopted in the reported decision of any federal court at the time of Simmons' sentencing, the factors that distinguish this case from *James* compel a conclusion that the performance of Simmons' counsel met neither prong of the *Strickland* test. Counsel's performance cannot be deficient if the "error" alleged is a failure to engage in a futile exercise. *Carter v. Johnson*, 110 F.3d 1098, 1111 (5th Cir. 1997). There is no prejudice under *Strickland* and *Hill* absent a claim of innocence or the articulation of a plausible defense which could have been raised at trial. *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev'd in part on other grounds*, 117 L.Ed.2d 1673 (1997). Simmons makes no such claim and articulates no such defense. Finally, Simmons offers nothing to overcome the presumption of truthfulness that attaches to his statements at the plea hearing and sentencing. *United States v. Mateo*, 950 F.2d 44, 46-47 (1st Cir. 1991)*; United States*

[1] The government points out that Simmons testified at the trial of his co-defendant that he pled guilty to distributing crack cocaine. Partial Transcript of Proceedings (Docket No. 44) at 3-4. Because this testimony was given after Simmons was sentenced, I do not rely on it in my evaluation of Simmons' motion.

*v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984).

## III. Conclusion

For the foregoing reasons, I recommend that the motion to vacate, set aside or correct the sentence be **DENIED** without an evidentiary hearing.

### *NOTICE*

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated this 10th day of November, 1997.***

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***David M. Cohen***
***United States Magistrate Judge***